Supreme Court, U.S.
FILED

94-1741 APR 13 1995

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1994

DEBORAH CROCKER,

Petitioner,

v.

UNITED STATES AVIATION UNDERWRITERS, INC., FITCHBURG-LEOMINSTER FLYING CLUB, INC. AND JOHN C. HOLDEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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QUESTION PRESENTED.

For the purposes of determining coverage under a private non-commercial airplane's insurance policy that excludes certain coverage to any person who is a "passenger" on that airplane, is a person a "passenger" when she is maimed by the airplane's rotating propeller while walking on the ground outside the airplane at the time of her injuries?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, Deborah J. Crocker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on December 16, 1994, with respect to which the petitioner filed a timely petition for a rehearing which was denied on January 13, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 42 F.3d 84 (1st Cir. 1994), and is reprinted in the appendix hereto (App., *infra*, A1).[1] The opinion of U.S. District Court Magistrate Swartwood is not reported and is reprinted in the appendix hereto (App., *infra*, A20). The memorandum and order of the United States District Court for the District of Massachusetts (Gorton, D.J.) has not been reported. It is reprinted in the appendix hereto (App., *infra*, A12).

JURISDICTION

The court of appeals entered its judgment on December 16, 1994 and entered its denial of petitioner's motion for a rehearing on January 13, 1995. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

No federal statute is involved.

STATEMENT OF THE CASE

Petitioner is the plaintiff in a pending state court personal injury action against parties who are insured by the respondent, an insurance company. In that action, she claims negligence on the part of the pilot of a single engine, overhead wing aircraft and damages as a result of being struck and severely maimed by the plane's rapidly rotating propeller as she was walking near it.

This petition arises out of a declaratory judgment action brought by the respondent, the insurance company for the air-

[1] Citations herein to "App." denote the Appendix which has been filed herewith.

plane, against the petitioner and also against its insureds. The respondent's insurance contract provided for one million dollars in personal injury liability coverage. However, the respondent has sought a declaration that because of a particular exclusionary provision in the policy, it was not required to provide personal injury liability coverage in excess of one hundred thousand dollars with respect to any judgment that might be rendered against its insureds, the defendants in the state court action. The insureds have taken no action with respect to this declaratory judgment case. The petitioner asserts that by the very terms of the policy, the applicable coverage provided by the respondent insurance company is one million dollars.

The underlying declaratory judgment action was commenced against the petitioner by the respondent on May 7, 1993, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and was before the district court under diversity of jurisdiction. Diversity of jurisdiction was established, pursuant to the respondent's Complaint, which alleged that the respondent is a New York corporation, and that all other parties to the action were either Massachusetts residents or a Massachusetts corporation.

Respondent sought a declaration that the petitioner was a "passenger" at the time of her injuries even though the petitioner (who was not the pilot of the aircraft) was struck by the airplane's propeller at the front of the aircraft after (a) having alighted from the airplane at her journey's end, (b) having left the airplane door behind her, and (c) having walked a sufficient distance to come in contact with the propeller at the front of the plane. As a result of such a declaration, the petitioner would be excluded from the one million dollars of policy coverage and would be deemed to be limited to the policy's $100,000 "per passenger" limit as the maximum liability coverage available to satisfy any judgment she might obtain against the respondent's insureds.

The respondent moved for summary judgment on August 6, 1993, and a hearing was held on February 22, 1994, before U.S. District Court Magistrate Swartwood. On March 4, 1994, Magistrate Swartwood issued a Report and Recommendation (App. A21) to U.S. District Court Judge Gorton in which he found that "for purposes of the policy, Crocker was not a passenger [within the policy definition] at the time that she was injured after alighting from the Cessna". (App. A29).

Judge Gorton declined to adopt Magistrate Swartwood's recommendation and, without a hearing, on May 11, 1994, issued his own Memorandum and Order (App. A12). The court did adopt Magistrate Swartwood's findings of fact. But while noting that this case involves "a question of law about which reasonable minds may differ" (App. A18), the court found that Ms. Crocker "remained a 'passenger' within the meaning of the policy" (App. A18) at the time of her injuries even though she had completely disembarked from the airplane and was walking or standing on the ground some distance away from the point where she had exited the airplane when she was struck by its rapidly rotating propeller. The district court also granted summary judgment in favor of the respondent limiting the liability coverage of the insurance policy to the $100,000 "per passenger" amount for any claim made by the petitioner, Ms. Crocker, instead of the $1,000,000 of coverage available to satisfy a claim by an injured person not deemed to be a passenger at the time of her injuries.

On May 24, 1994, the petitioner filed her Notice of Appeal pursuant to and in conformance with F.R.A.P. Rule 4. After oral argument, the court of appeals, on December 16, 1994, affirmed the judgment of the district court. The court of appeals, on January 13, 1995, denied Ms. Crocker's request for a rehearing (App. A31. The original order denying rehearing contains an obvious typographical error in that it is dated "January 13, 1992.").

The operative facts of the case, as found by Magistrate Swartwood, and adopted by the district court, are as follows:

1. The policy covered the period September 1, 1980 through September 1, 1981.

2. The policy was in effect and covered the Cessna when the accident occurred on December 25, 1980, at the Toronto International Airport.

3. The coverage provided by the policy had a combined liability coverage for bodily injury and property damage of $1,000,000 "subject to a maximum limit of $100,000.00 per passenger."

4. Under the heading **"Your Liability Coverage"** in the policy is included the following paragraphs:

> *Coverage for bodily injury to anyone but passengers.* If you have this coverage, [U.S.A.U. will] pay claims for bodily injury and mental anguish to anyone — except a passenger — who is injured resulting from the ownership, maintenance or use of your aircraft. A passenger is anyone who enters your aircraft to ride in or operate it. (emphasis added [by the Magistrate])
>
> *Coverage for bodily injury to passengers only.* If you have this coverage [U.S.A.U. will] pay claims for bodily injury and mental anguish to any passenger in your aircraft who is injured resulting from the ownership, maintenance or use of the aircraft. A passenger is anyone who enters your aircraft to ride in or operate it. (emphasis added [by the Magistrate])

5. On December 25, 1980, Holden, Crocker and two of Holden's children by another marriage flew in the Cessna

on a family trip from the Fitchburg Airport to the Toronto International Airport in Ontario, Canada.

6. Upon landing, Holden taxied the Cessna to the general aviation area of the airport for purposes of locating a parking place.

7. Holden was unsuccessful in finding assistance at this location and taxied the Cessna to a point directly in front of a building where he saw someone through a lighted window.

8. Holden flashed the Cessna's landing lights in an unsuccessful attempt to get the attention of that person.

9. Holden and Crocker then had a brief conversation which resulted in her leaving the Cessna in order to seek assistance from the person Holden saw through the lighted window.

10. Crocker exited the Cessna and was struck on her head and left side by the rotating propeller, causing her severe and permanent physical and mental injuries.

11. On or about December 25, 1990 (ten years following the accident), Crocker commenced a civil action in the Massachusetts Superior Court (Worcester) against Holden and the Flying Club. In her Complaint, she alleged that she was incapacitated by mental illness, due to severe and permanent neurological brain trauma, thus tolling the statute of limitations for commencing a civil action for negligence arising out of this accident.

12. Thereafter, U.S.A.U. filed this action seeking a declaratory determination that Crocker was a passenger at the time she was injured and as such, the available insurance coverage is limited to $100,000 (App. A22-24).

The magistrate recommended that the term "passenger" did not apply to Ms. Crocker at the time of her injuries since she had exited the airplane at the end of her trip and walked some

distance before being struck, and "in light of the clear terms and plain meaning of the policy." (App. A27). However, despite the magistrate's finding that the policy's terms were clear and its meaning was plain, the courts below construed the exclusionary language of the policy in favor of the insurer and also resolved any ambiguities in the policy in favor of the insurer, and determined that Ms. Crocker was excluded from the broader coverage of the policy applicable to non-passengers. Thus, Ms. Crocker's claim was excluded from the one million dollars of coverage under the policy and was limited to the one hundred thousand dollars per "passenger" coverage even though she was safely on the ground outside of the aircraft at the end of her trip, in no different physical relationship to the aircraft than a member of the general public or airport staff would have been if they had been walking nearby at the time.

REASONS FOR GRANTING THE PETITION

I. The decision of the Court of Appeals for the First Circuit conflicts with the Eighth Circuit's interpretation of the term "passenger" in an insurance policy and creates a split of authority in the circuit courts.

II. The decision below is one as to which Massachusetts state laws and decisions are applicable and is in conflict with one or more decisions rendered by the highest court of the state.

III. The decision below is erroneous in that it is based upon (a) facts assumed by the Court of Appeals, which facts do not appear in the record, and (b) inapposite case law.

As grounds for this petition, the petitioner avers that the courts below erred in overlooking, misinterpreting and misapplying various points of applicable law and fact when they concluded, as a matter of law, that the petitioner was a "passenger" according to the respondent's insurance policy definition of that term when she was struck by the airplane propeller. The

decision in this case conflicts with *Vogrin* v. *Hedstrom*, 220 F.2d 863, 866 (8th Cir. 1955) and *Emerson* v. *Carolina Casualty Ins. Co.*, 206 F.2d 13 (8th Cir. 1953). It also is in conflict with a decision of the highest appellate court of the state of Massachusetts that has spoken on the subject of interpretation of insurance contracts, *Camp Dresser & McKee, Inc.* v. *Home Ins. Co.*, 30 Mass. App. Ct. 318, 323-24, 568 N.E.2d 631 (1991).

Petitioner asserts that the courts below erred by failing to utilize the established standard for determining whether or not a particular word or phrase contained in an insurance policy is ambiguous. Despite the district court's opinion that "reasonable minds may differ" (App. A18) as to the interpretation of the policy language and despite the U.S. Magistrate's Report and Recommendation that the respondent's own definition limited coverage to passengers injured "*in [the insured's] aircraft*" (App. A28), the district court ruled, and the appeals court affirmed, that "passenger", as defined in respondent's own policy, was not ambiguous and, therefore, included persons outside of the aircraft. The appeals court made this erroneous determination despite ruling that respondent's own definition of "passenger" did "not carry [the court] very far" towards an understanding of who is considered to possess the status of "passenger" under the policy. (App. A6).

The courts below then further erred by conveying upon the word "passenger" a definition beyond its ordinary meaning. "Where there is no ambiguity in the language at issue, we will interpret it 'according to the ordinary meaning of the words contained in its provisions'." *Bird* v. *Centennial Ins. Co.*, 11 F.3d 228, 232 (1st Cir. 1993), quoting from *J.I. Corp.* v. *Federal Ins. Co.*, 920 F.2d 118, 119 (1st Cir. 1990). Petitioner avers that a "reasonable person, reading the [policy] as a whole and in a realistic context" would not "clearly point . . . toward a readily ascertainable meaning" for the word "passenger" that

would encompass petitioner while she was (a) completely outside of the aircraft, (b) not in contact with the plane, and (c) with both feet on the ground after having taken a number of steps. *Fashion House, Inc.* v. *K. Mart Corp.*, 892 F.2d 1076, 1085 (1st Cir. 1989). "Where possible, words should be given their natural meaning, consistent with the tenor of contractual terms". *Id.* The courts below did not apply the natural meaning to the word "passenger."

In fact, the Eighth Circuit Court of Appeals has ruled that, "[w]hatever its technical legal significance may be, in common parlance, it [the term "passenger"] means an occupant of a . . . vehicle other than the person operating it and describes a physical status rather than a technical legal status." *Vogrin* v. *Hedstrom*, 220 F.2d 863, 866 (8th Cir. 1955). At the very least, as demonstrated in the record by the completely different opinions of the U.S. Magistrate and the district court, respondent insurance company's definition of "passenger" is capable of two rational intrepretations. "If there are two rational interpretations of policy language, the insured is entitled to the benefit of the one that is more favorable to it." *Hazen Paper Co.* v. *USF&G Co.*, 407 Mass. 689, 700 (1990). In this case, the district court and the appeals court claim to have found the term "passenger" to be unambiguous, despite a contrary finding by the U.S. Magistrate, and only after lengthy analyses and interpretations of mostly irrelevant case law which, for the most part, did not deal with the term "passenger" at all. In doing so they erroneously afforded the language of the policy an interpretation of the word "passenger" that was favorable to the insurer, not to the insured. Such an interpretation is in conflict with recognized and applicable Massachusetts law which requires courts to construe an insurance policy "according to the fair and reasonable meaning of its words," to interpret exclusionary language in an insurance policy against the insurer, and to resolve all ambiguities in an insurance policy

against the insurer. *Camp Dresser & McKee, Inc.* v. *Home Ins. Co.*, 30 Mass. App. Ct. 318, 323-24, 568 N.E.2d 631 (1991).

The district court and the court of appeals also erred by making bald assumptions not supported by the record concerning what the expectations of the parties to the insurance contract may have been at the time the policy was issued. The courts assumed that the particular coverage was actually chosen by the insured, although there is no such evidence or finding in the record. The courts assumed that the particular coverage was offered at a lower premium cost than the other types of coverage described in the policy, even though there is no such evidence or finding in the record. The courts assumed that the other types of coverage mentioned in the policy were actually offered to the insured, and there is no such evidence or finding in the record to that effect either. These assumptions, made in error because they were not based upon anything in the record, were digressions from the main issue in the case, whether the petitioner at the time of her injuries was a "passenger" within the ordinary meaning of that word as defined in the insurance company's contract.

The courts below should have determined whether a reasonable layperson reading the policy would say that the petitioner was a "passenger" (as that word is defined in the insurance policy) at the moment she was struck by the propeller (while both her feet were on the ground outside the aircraft, after she had left the door to the aircraft behind her at the end of her flight on it, and after she had walked at least a number of feet away from the aircraft's door). The courts mistakenly relied on cases interpreting insurance policies that contained definitions dissimilar to respondent's definition of "passenger," (such as, "a 'passenger' is anyone involved in aeronautical activity") as well as cases determining a common carrier's duty of care (this case does not involve a common carrier), as support for their decisions that the respondent insurance company's defi-

nition of "passenger" included persons walking on the ground outside the aircraft.

According to each of the courts below, their interpretation of the policy language is supported by the assumed intent of the parties. However, the courts improperly failed to consider the importance of the respondent insurance company's decision to actually and specifically define "passenger" in its policy form rather than leave it undefined. Petitioner avers that since the respondent issued its policy with an inartful definition of "passenger", rather than leaving the word undefined and possibly subject to interpretation based on its customary meaning, the respondent insurance company should be precluded from receiving the benefit of favorable inferences as to the meaning of such an exclusionary provision (especially not inferences that incorporate a more expansive meaning of the word "passenger" than is set forth in the policy's definition). What the respondent sought, and what was improperly granted and upheld by the courts below, was a different definition of the word "passenger" than was set forth in its policy, a different definition of the word than was found by the Eighth Circuit in *Vogrin* v. *Hedstrom*,, 220 F.2d 863 (8th Cir. 1955), and it wanted that different definition for the sole purpose of excluding its insureds and the petitioner from being able to reach nine hundred thousand dollars of coverage.

Not one case cited by the courts below involved an interpretation of an insurance contract's definition of the word "passenger" which was defined in an insurance contract in the same way as, and as narrowly as, the respondent defined the word in its policy. In fact, the courts below seem to have relied on cases interpreting life insurance and other policies which specifically excluded from coverage persons engaged in such things as "aeronautical activity" and/or "getting off" an aircraft as support for their determination that "passenger", as used in the respondent's policy, includes persons walking outside the aircraft.

The case of *Pittman* v. *Lamar Life Ins. Co.*, 17 F.2d 370 (5th Cir. 1927) cited by the courts below is not applicable to the facts in the instant case because in that case the life insurance policy excluded coverage for those persons killed while "participating in aeronautical activity" which is clearly a more expansive concept and involves activities other than just riding in an airplane (such as bailing out of the aircraft or servicing it).

Such broader and more expansive language ("aeronautical activity", "disembarking", or "getting off"), which easily could have been used by the respondent, was not contained in its definition. The courts mistakenly failed to consider that such terms ("aeronautical activity" and "getting off") already had been utilized by other insurance companies to specifically exclude or limit coverage by the time the respondent had issued its policy in this case. The courts did not recognize the significance of the respondent's failure to include such broader terms within its definition. A reasonable inference may be drawn that the respondent, by failing to define "passenger" as meaning anyone involved in "aeronautical activity" in connection with the subject airplane, must have intended not to include as "passengers" those persons outside the airplane who were nevertheless engaged in "aeronautical activity" (such as refueling, bringing a message to the pilot, or loading baggage) nor those "getting off" the aircraft since it made no mention of those types of activities. Someone who is "participating in aeronautical activity" can be vastly different from, and encompassed within a much broader and more expansive range of activities, both in and around the airplane, than someone who is merely a "passenger" . . . "who entered [an] aircraft to ride in or operate it." To suggest that cases interpreting such broad based definitions as "aeronautical activity" are proper precedent for interpreting a person's status as a "passenger", as defined in the respondent's policy, is plainly wrong.

A layperson, without the benefit of the legal analysis performed by the courts would not ordinarily consider someone

who is completely outside of a vehicle, physically detached from it and with both feet firmly planted on the ground, to be a passenger in that vehicle. *See Vogrin, supra*. The court below mistakenly suggests that the proper standard to be employed in determining a layperson's interpretation of "passenger" involves performing the same tortuous analysis as the courts below did, including a review of a variety of cases, before such a person could determine the word's plain, ordinary and customary meaning. Such a standard is inapposite to the established case law, unnecessarily complicates the process of determining the ordinary meaning of the word "passenger" and can result in definitions which in many ways differ from ordinary and common meanings. Plain, ordinary and customary meanings cannot be plain, ordinary and customary if one must undergo a complex analysis of the case law and make unsubstantiated assumptions to arrive at such a meaning.

Contrary to the court of appeal's assertion that petitioner failed to provide the court with any cases involving "the narrowest of definitions of the word 'passenger' or similar words" (App. A13), petitioner asserts that she did, but that such cases were apparently overlooked, misinterpreted or misapplied. The courts below completely failed to mention and apparently did not even consider the opinions of the Eighth Circuit Court of Appeals in *Vogrin, supra*, and of the District of Columbia Court of Appeals in *Edwards* v. *Mutual of Omaha Insurance Company*, 842 F.2d 1316 (D.C. App. Ct. 1988), as cited in petitioner's brief. In *Edwards*, the issue was whether a provision in a life insurance policy that covered a "passenger . . . riding in or getting . . . off" a vehicle included someone who had disembarked but had not reached a "zone of safety". *Id.* at 1317. In that case, Mr. Edwards had completed his departure from the bus and was on the sidewalk when he fell under the wheels of the bus and was killed. The court in *Edwards* ruled that the decedent therein was not a "passenger" and distinguished the case from those in which "courts have adopted a

broader interpretation of the concept of a passenger." *Id.* at 1318. The court further opined that, unlike those cases dealing with issues of disembarking and zone of safety, "an insurance policy existed in the [*Edwards*] case whose language defined the covered class", precluding resort to the broader definition established for tort liability. *Id.* at 1318. Since the respondent insurance company chose a narrow definition of "passenger", the courts below committed error by expanding that definition in favor of the insurer on the basis of cases that determined a person's status as a passenger (or not) for the purposes of establishing tort liability or defining policy terms that were different from those drafted by the respondent in its policy.

The inapplicability of the *Pittman* case has been mentioned above. Likewise, the reliance of the courts below on *Willingham* v. *Life & Casualty Ins. Co. of Tenn.*, 216 F.2d 226 (5th Cir. 1954) and *Wendorff* v. *Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S.W.2d 99 (1927) was misplaced since both cases involved injuries and death arising directly from difficulties "in flight" which caused each airplane to crash, and not instances where someone voluntarily exited the aircraft while on the ground after completion of the flight as were the facts in this case. In both *Willingham* and *Wendorff*, at the time of crash, the passenger was in the aircraft.

In the case of *Emerson* v. *Carolina Casualty Ins. Co.*, 206 F.2d 13 (8th Cir. 1953), cited by the courts below, the Eighth Circuit Court of Appeals opined that a person could be found to be a passenger in common carrier and/or guest statute cases when "he would not have been so characterized under the ordinary meaning of the word". *Id.* at 17. But this petitioner's case does not involve a common carrier or automobile guest statute case. The policy in *Emerson* excluded "passengers" from coverage. The decision of the court of appeals below erroneously stated that the *Emerson* court denied the injured party in that case the status of guest passenger. In fact, the

Emerson court denied the injured party in that case the status of guest passenger. In fact, the *Emerson* court denied the insurance company in that case the right to call the injured party (who was neither "riding upon nor within the vehicle" at the time of his injuries) a "passenger", thus appropriately interpreting exclusionary language against the insurance company and in favor of the injured party and allowing the injured party coverage under the insurance contract. *Id.* at 18. In the petitioner's case, the courts below not only mistakenly opined that the word "passenger" as it is ordinarily understood includes persons outside the conveyance but also mistakenly assumed that a passenger in a single engine plane is ordinarily instructed to obtain ground assistance for parking a plane. No evidence or case law suggests that an ordinary layperson considers someone outside a conveyance to be a passenger nor is there any evidence to support the proposition that airplane passengers are ordinarily called upon to leave the aircraft to expedite ground assistance.

The reliance of the courts below on the decisions in *Ethier* v. *Audette*, 307 Mass. 111, 29 N.E.2d 707 (1940); *Bragdon* v. *Dinsmore*, 312 Mass. 628, 45 N.E.2d 833 (1942) and *Sutherland* v. *Scardino*, 334 Mass. 178, 134 N.E.2d 444 (1956) is also misplaced. Those cases dealt specifically with the duty of care of an automobile driver to his guest under now long outdated common law which protected the driver of an automobile from claims by guests except in cases of gross negligence. They did not deal with an interpretation of the boundaries of the definition of the word "passenger" under the terms of an insurance policy where the law still strongly favors construing exclusionary language *against* the insurer. It was error for the court to incorporate those decisions into its opinion as supportive of respondent's position that the petitioner was a passenger within the terms of the policy at the time she was injured.

It was also error for the courts to suggest, unsupported by any facts, that the petitioner had "temporarily" left the aircraft. (App. A7). No evidence suggests she would have reentered or intended to reenter the aircraft that evening. Since there was no evidence to suggest the petitioner would reenter the aircraft, the courts should have determined that her trip terminated when she got out of the plane, as the court in *Edwards, supra*, determined once Mr. Edwards was on the ground off the bus. The moment the petitioner exited the aircraft at her trip's destination, like Mr. Edwards did from the bus, she ceased to be a "passenger" under respondent's own definition. She was not riding in nor operating it. Had this case involved a determination of her status under a common carrier or guest statute, then the courts would have been permitted to undertake the analyses they performed. But that was not their function and, therefore, their failure to follow the well-established standards for interpreting insurance policy terms was error.

If an ordinary person would have readily ascertained that "passenger", as used in the context of respondent's insurance policy, included persons outside the conveyance, it would not have been necessary for the courts below to go to the lengths they did to incorporate decisions involving outdated duty of care/automobile guest cases or those cases interpreting completely dissimilar insurance policy definitions of "passenger". By performing this analysis, it is clear that the courts below could not determine that an ordinary person would be able to readily ascertain the same meaning for the word "passenger" as they did in this case. Therefore, either "passenger", as defined in the policy, does not ordinarily encompass those situations cited by the courts, or the language of the policy is ambiguous. In either event, the interpretation of the term must be strictly construed against the respondent insurance company. *Camp Dresser & McKee, Inc.*, 30 Mass. App. Ct. 318, 568 N.E.2d 631 (1991); *KDT Industries, Inc.* v. *Home Ins.*

Co., 603 F.Supp. 861 (D.Mass. 1985). By construing the term against the petitioner and in favor of the insurance company, they committed error.

No reasonable person would suggest that the respondent's definition of "passenger" would encompass those persons injured or killed in another aircraft. Rather, a better explanation is that the respondent was narrowing its definition of "passenger" to include only those persons inside Fitchburg-Leominster's aircraft. The courts below offered no rationale for the fact that every time the word "passenger" is mentioned in the applicable coverage sections of the respondent's insurance policy, it is used in conjunction with the word "in", not the word "of". The word "in" has a plain, ordinary and customary meaning. It does not mean "of" or "outside".

CONCLUSION

The courts below erred when, after determining that the term "passenger" was not ambiguous, they nevertheless went on to reject the word's plain, ordinary and customary meaning. The courts also erred by failing to apply the applicable law which required that they construe the policy language against the insurance company and in favor of the petitioner. The courts' failure to rely on or distinguish the rulings in *Edwards*, *Emerson* and *Vogrin*, *supra*, further supports petitioner's position that the courts overlooked, misinterpreted and misapplied the law governing the issues in this matter.

The petition for a writ of certiorari should be granted.

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United States Court of Appeals for the First Circuit.

No. 94-1644

UNITED STATES AVIATION UNDERWRITERS, INC.,
PLAINTIFF-APPELLEE,

v.

FITCHBURG-LEOMINSTER, FLYING CLUB, INC., ET AL.,
DEFENDANTS-APPELLEES,
AND
DEBORAH G. CROCKER,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. Nathaniel Gorton, U.S. District Judge]

Before

Torruella, Chief Judge,
Coffin and Campbell,* Senior Circuit Judges.

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*Judge Campbell heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 289 U.S.C. § 46(d).

Traver Clinton Smith, Jr., with whom Michael P. Giunta and Margot A. Clower were on brief for appellant Crocker.

Richard M. Sharp with whom John Moustakas, Peter L. Puciloski and Keith D. Dunnigan were on brief for appellee U.S. Aviation Underwriters, Inc.

December 16, 1994

COFFIN, Senior Circuit Judge. Deborah Crocker sued the Fitchburg-Leominster Flying Club, Inc. and her former husband (the insureds) in state court to recover $1,000,000 for injuries suffered when, on exiting a plane to seek help in parking it, she accidentally walked into its rotating propeller. The plane was owned by the Club and was being operated by her then husband. The liability insurer brought this diversity action in the United States District Court for the District of Massachusetts, seeking a declaration that, since the victim was a "passenger" within the meaning of the policy, even though she was outside the plane at the time of the accident, its policy restricted coverage to $100,000 for any judgment that might be recovered in the state court action. The district court granted summary judgment to the insurer. We affirm.

Background

The undisputed facts are that, on December 25, 1980, John Holden, his then wife Deborah Crocker, appellant herein, and his two children flew in a single engine Cessna from a Boston suburb to the Toronto International Airport. The aircraft had overhead wings and a propeller in the nose. The plane landed at dusk and Holden taxied it to an area near a building in which he saw someone through a lighted window. Unable to attract

attention by flashing the plane's lights, Holden spoke with his wife and she left to get help from the person in the window. The engine still running, she exited, leaving the door open. She was then struck in the arm and head by the propeller.

The Club's policy was issued on an insurance form that lists seven different categories of coverage.[2] The parties selected the first category, "combined liability for bodily injury and property damage," which insured against "claims for bodily injury, mental anguish and damage to someone else's property, resulting from the ownership, maintenance or use of the aircraft." This insurance covered up to $1,000,000 of liability, but was subject to a cap of $100,000 per passenger. The term "passenger" is defined as "anyone who enters your aircraft to ride in or operate it."[3]

The policy contains additional language relating to "passenger" in other options not selected. The second listed option covers bodily injury and property damage claims "except bodily injury and mental anguish claims by a passenger in your aircraft." The fourth option covers claims "for bodily injury and mental anguish to any passenger in your aircraft." The third option covers claims "for bodily injury and mental anguish to anyone — except a passenger — who is injured." The phrase "in your aircraft," present in the former two options, is not included in the latter.

[2]The seven kinds of coverage are (1) "combined liability coverage for bodily injury and property damage," (2) "combined liability coverage for bodily injury (except for two passengers) and property damage," (3) "liability coverage for bodily injury to anyone but passengers," (4) "liability coverage for bodily injury to passengers only," (5) liability coverage for property damage," (6) "medical coverage," and (7) "aircraft physical damage coverage."

[3]We, like appellee, do not consider it important that the combined liability coverage option selected does not itself contain this definition of passenger, which is given in several of the more narrow categories of coverage listed. Since the combined liability coverage is merely an amalgam of the risks covered by the narrower categories, by implication, the same definition of passenger applies.

Applicable Legal Standards

The issue of choice of law was apparently not addressed by the parties or the court below, but, since the policy was delivered to the Club in Massachusetts, which is also the domicile of insureds and claimant, we shall assume that the substantive law of that commonwealth applies. We suspect, however, that in general there is no relevant difference among jurisdictions. Our review of the propriety of summary judgment, in the absence of any factual dispute, is of course plenary.

In interpreting the insurance policy at issue in this case, we apply the three fundamental principles articulated in *Camp Dresser & McKee, Inc.* v. *Home Ins. Co.*, 30 Mass. App. Ct. 318, 323-24, 568 N.E.2d 631 (1991): we construe the policy "according to the fair and reasonable meaning of its words," interpret exclusionary clauses against the insurer, and resolve all ambiguities against the insurer. These tasks of contract interpretation, including the determination of ambiguity or its lack, are matters for the court. *Boston Edison Co.* v. *F.E.R.C.*, 856 F.2d 361, 365 (1st Cir. 1988) (referring to Massachusetts cases).

When, as here, both parties earnestly contend that an insurance policy is clear, unambiguous, with a fair and reasonable meaning exactly opposite to that advanced by their adversary, a court is tempted to say that, whatever a policy really means, it is at least ambiguous. But the discernment of two possible meanings for a word is not the end of a judicial assessment of ambiguity. As we have said:

> Lack of ambiguity is a relative status, not an absolute one. The parties need not choose phraseology which invariably excludes every possible interpretation other than the one they intend. [I]t [is] sufficient if the language employed is such that a reasonable per-

> son, reading the document as a whole and in realistic context, clearly points to a readily ascertainable meaning.

Fashion House, Inc. v. *K Mart Corp.*, 892 F.2d 1076, 1085 (1st Cir. 1989).

Analysis

Appellant would have us quickly assume that, based on its dictionary definition, the word "passenger" under this policy means someone who has entered the aircraft to ride in or operate it *and* who is in the aircraft at the time of injury. If one is outside, no matter how near or far, and regardless if the separation from the aircraft is recent or remote, transient or permanent, or involuntary or voluntary, one is no longer a "passenger." There is, indeed, literary precedent for such literal and narrow reading: Portia, a "rightful judge," refused to expand "a pound of flesh" to authorize the shedding of even a "jot of blood."[4]

But we lack the playwright's license. Literal exactitude is not the end of our quest. In *Hazen Paper Co.* v. *U.S. Fidelity & Guar. Co.*, 407 Mass. 689, 693, 555 N.E.2d 576, 579 (1990), a liability policy required the insurance company "to defend any suit seeking damages on accout of . . . property damage." The insured had been accused of releasing hazardous substances into the environment. The threshold issue confronting the court was whether a letter from the Environmental Protection Agency naming the insured as a "potentially responsible person" [PRP] constituted a "suit." The court reasoned:

> Obviously, on the record no lawsuit has been brought. Literally, there is no suit. That fact alone has been sufficient to provide the answer for some courts. [Citations omitted.] It is, however, not sufficient to provide an answer for us.

[4] William Shakespeare, *The Merchant of Venice*, Act IV, Scene 1, lines 306-313.

Id. After surveying the importance to the insured of the early involvement of the insurer on receipt of a PRP letter, it concluded that "[t]he consequences of the receipt of the EPA letter were so substantially equivalent to the commencement of a lawsuit that a duty to defend arose immediately." *Id.* at 696, 555 N.E.2d at 581.

Similarly, our focus must be the broader one of discerning the parties' reasonable expectations from the context and the purposes sought to be served. As the *Hazen Paper* court put it, "[i]t is . . . appropriate, in construing an insurance policy, to consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." *Id.* at 700, 555 N.E.2d at 583. Accordingly, both to probe fair and reasonable meaning and to test for ambiguity, we examine the actual language used, the context, the parties' reasonable expectations, and the relevant cases.

The policy definition of passenger — "anyone who enters your aircraft to ride in or operate it" — does not carry us very far. Indeed, on its face, it does not seem to contemplate that the status of passenger ever terminates. We are confident the parties did not intend that, under this policy, once an individual entered the insureds' aircraft, she would remain, for all time, a passenger.

The context in which the policy was written, however, is decidedly more illuminating. This a two tier policy of liability insurance for a recreational flying group and its members. It protects the insureds for up to one hundred thousand dollars against claims by individual passengers and up to one million dollars against claims by non-passengers. As we contemplate what the parties must reasonably have intended and expected, we readily assume that they were aware of the full range of possible injuries that could befall members of the Club and their guests, including possible injury or death due to emergency landings or accidents involving maintenance work.

We also assume they knew the risks of injuries to other aircraft and their owners, operators, and passengers, visitors to the airport, licensees, workmen, and all third parties. Finally, we assume that keeping down the cost of premiums was an important consideration in choosing to cover claims by passengers up to one hundred thousand dollars instead of up to one million dollars.

In this context, we cannot believe that the Club, its members, or the insurer could have intended that members and their guests could suddenly find themselves eligible for the million dollar coverage because they were forced to exit an aircraft by parachute and subsequently were injured or killed, or because they suffered some injury or anguish while making emergency repairs in flight, or while trying to remove wheel blocks or adjust a propeller before takeoff, or, as here, while temporarily leaving the plane to get assistance prior to securing the aircraft for the night. Conversely, if only passenger coverage had been purchased and the same situations occurred, we doubt very much that the parties would expect to find themselves deprived of coverage. We conclude that there is a reasonable expectation that "passenger" implies some necessary, unavoidable or frequently encountered situations occurring in connection with and in proximity to, but outside, an aircraft.[5]

What we described as our sense of the situation is amply borne out by the cases, some of them going back to the 'twenties. Similar language as that in the policy at issue has been construed to apply to persons who, during a journey by aircraft, had occasion to approach the plane and collided with the pro-

[5] It is true that the phrase "in your aircraft" is found in two of the (not selected) coverage descriptions. *See supra* at 3-4. But it seems likely to have been inserted to emphasize that the limitation does not apply to passengers in *another* aircraft who have been injured. And, as we have noted, the clause is not to be found in a companion clause offering coverage for bodily injury to anyone but passengers. There is no rational explanation for this varying treatment and we therefore assign no other significance to the phrase.

peller. In *Pittman* v. *Lamar Life Ins. Co.*, 17 F.2d 370 (5th Cir. 1927), a co-owner of an aircraft, which stopped near a hangar with its engine running, got out, walked toward his automobile, and was struck by the propeller and killed. The life insurance policy contained a provision that limited benefits in the event that death was caused by "participating in aeronautical activity." The court held that "aeronautical activities of one who takes [an airplane] trip . . . includes his presence or movements in or near to the machine incidental to beginning or concluding the trip" and that the activity in this case was so "connected with and incidental to the airplane trip." *Id.* at 371.

The narrow term, "riding in" an aircraft, was held to include one who jumped or was thrown from it in *Willingham* v. *Life & Cas. Ins. Co. of Tenn.*, 216 F.2d 226, 228 (5th Cir. 1954). The court said, "[w]e think that the phrase 'riding in' in the context here employed is unambiguous and clearly includes falling or being thrown from the airplaine because of difficulties in flight."

A similarly narrow definition contained in a policy exclusion (injury sustained "while in or on any vehicle . . . for aerial navigation") was held to apply to a death by drowning after a forced landing on water in *Wendorff* v. *Missouri State Life Ins. Co.*, 318 Mo. 363, 366-67, 1 S.W.2d 99, 100 (1927). Almost forty years later, in a case involving a crash during takeoff near a lake, the Ninth Circuit similarly ruled, under policy language covering death from "operating or serving as a member of a crew of an aircraft." *Rauch* v. *Underwriters at Lloyd's of London*, 320 F.2d 525, 526 (9th Cir. 1963). The court held that the "aeronautical activities of decedent Rauch did not end with the actual flight . . . but included his voluntary or involuntary presence and movements in the lake water near the plane following its crash." *Id.* at 531. In short, "operating" included something following actual operation of the plane.

Other cases recognizing risks of drowning as familiar risks of aviation are *Green* v. *Mutual Benefit Life Ins. Co.*, 144 F.2d 55 (1st Cir. 1944), and *Neel* v. *Mutual Life Ins. Co.*, 131 F.2d 159 (2d Cir. 1942).

In the instant case, the activity in which appellant was engaged was not reembarking or parachuting or struggling in the water after a crash but, more like that in *Pittman*, even more tied to trying to bring about the successful end of the flight, to obtain assistance before securing the aircraft. The concept of coverage for one who was injured while assisting the transportation enterprise was articulated in *Emerson* v. *Carolina Gas Ins. Co.*, 206 F.2d 13 (8th Cir. 1953), where a passenger in a truck had been asked by the driver to help uncouple a trailer and was then injured. The court denied him the status of guest passenger because it was not reasonable that a guest passenger would be instructed to do something that was normally done by the operator at the end of a journey. But it said:

> If what Goodman was doing at the time of his injury was a reasonable incident to his relationship of the kind of passenger he initially was, he will continue to be a passenger although not physically in or upon the vehicle. *Ruel* v. *Langelier*, 299 Mass. 240, 12 N.E.2d 735.

Id. at 18.

Emerson's citation to *Ruel* v. *Langelier* leads us to a number of Massachusetts cases dealing with a related question: when does the status of a guest passenger in another's automobile cease for purposes of determining the driver's duty of care in tort suits? In *Ruel*, the defendant offered plaintiff a ride home, but, because his car was stuck in the snow, he first elicited her help in pushing the car free. She was injured in the attempt. The court found that, though she was outside the car at the time

of the injury, she was still his guest. *Ruel* v. *Langelier*, 299 Mass. at 242.

In *Ethier* v. *Audette*, 307 Mass. 111, 29 N.E.2d 707 (1940), the driver of the vehicle gave plaintiff a ride home. The plaintiff wanted to stop to buy sandwiches for both to eat at her home. They stopped at a restaurant; plaintiff walked toward it, then back to the car to persuade the driver to join her; the motor running, the car slipped into reverse and injured plaintiff, whose foot was on the running board. The court held that "[t]he stop, which was for a common purpose, was an incidental part of the transportation, and a part of the undertaking." *Id.* at 113, 29 N.E.2d at 708. Similarly, in *Bragdon* v. *Dinsmore*, 312 Mass. 628, 630, 45 N.E.2d 833 (1942), helping a driver park a vehicle was held to be "necessarily incidental to the accomplishment of the gratuitous undertaking, in order to carry out its prearranged purpose."

Finally, in *Sutherland* v. *Scardino*, 334 Mass. 178, 134 N.E.2d 444 (1956), plaintiff helped the driver change a flat tire. He was held still to be an "occupant" of the vehicle. The fact that plaintiff was not in defendant's vehicle when injured was not material. "Both were in its immediate vicinity engaged in activities designed to promote a resumption of its use." *Id.* at 182, 134 N.E.2d at 446.

In sum, we feel that the Massachusetts Supreme Judicial Court would apply similar reasoning in determining whether appellant in the case at bar had lost her status as passenger because she had left the aircraft momentarily to seek help and was injured almost immediately.

We have searched for contraindications of these authorities, ancient as some may be. Appellant has not favored us with any cases where, in like situations, the narrowest of definitions of "passenger" or similar words has been applied to exclude necessary or predictable events so closely tied to the original status. She has argued mainly against relying on precedents

construing cases decided under the Warsaw Convention and common carrier cases where pro-passenger public policy may have played a major role. We have not relied on any.

As for appellant's urging that we construe exclusionary clauses against the insurer, we observe that this policy form contains certain options covering passengers and certain options covering non-passengers. If the insureds had chosen only the option covering passengers, it could not be argued that the policy provision that was the source of protection was an exclusion. The same reasoning applies to the policy actually chosen, which combines extensive coverage for non-passengers with more limited coverage for passengers. The coverage for passengers is not subject to the special rules of construction for policy exclusions.

We therefore, after this considerable journey, conclude that the policy language at issue is not, in law, ambiguous, and that its fair and reasonable purport is to include appellant as a "passenger" at the time of her unfortunate accident. The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

U.S. AVIATION UNDERWRITERS, INC., Plaintiff,	)	
v.	)	Civil Action No. 93-40081-NMG
FITCHBURG-LEOMINSTER FLYING CLUB, INC., JOHN C. HOLDEN AND DEBORAH G. CROCKER, Defendants.	)	

MEMORANDUM AND ORDER

GORTON, J.

Pending before this Court are the Objections filed by plaintiff to the Report and Recommendation issued on March 4, 1994 by Magistrate Judge Charles B. Swartwood, III. Plaintiff objects to the recommendation of the Magistrate Judge with respect to plaintiff's motion for summary judgment.

I. PROCEDURAL BACKGROUND

On May 7, 1993, United States Aviation Underwriters, Inc. ("U.S.A.U.") filed a complaint for declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed.R.Civ.P. 57. U.S.A.U. seeks a determination of the possible extent of its insurance policy coverage arising out of an accident involving the defendants on December 28, 1980, in which defendant Deborah Crocker ("Crocker") was seriously injured. U.S.A.U. issued an

insurance policy ("the Policy") to defendant Fitchburg-Leominster Flying Club, Inc., covering the period during which the accident occurred. The policy limits were $1,000,000 combined liability for bodily injury and property damage to non-passengers and $100,000 for injuries to passengers of the aircraft. The Policy defined a "passenger in [the] aircraft" as "anyone who enters your aircraft to ride in or operate it."

The question presented, which is determinative of the amount of available insurance coverage, is whether or not, at the time of the accident, Crocker was a passenger as defined by the Policy. Because the facts are undisputed and are set forth in detail in the Magistrate Judge's report, this Court will not reiterate them in this Memorandum.

On February 1, 1994, the motion of U.S.A.U. for summary judgment was referred by Order of Reference of this Court to Judge Swartwood for findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B). In his Report and Recommendation, the Magistrate Judge allowed U.S.A.U.'s motion for summary judgment, but found that Crocker was not a passenger at the time of the accident and that therefore the available insurance coverage is $1,000,000. U.S.A.U. filed its objections to the recommendation on March 7, 1994, which it amended on March 11, 1994. Defendant filed no objections.

II. Legal Analysis

A. *Standard of Review*

This Court reviews the Report and Recommendation according to the standards adopted by the United States Court of Appeals for the First Circuit. Findings of fact are approved unless clearly erroneous and questions of law are review *de novo*. *U.S.* v. *Howard*, 996 F.2d 1320, 1327-28 (1st Cir. 1993); *Rivera-Marcano* v. *Normeat Royal Dane Quality A/S*, 998 F.2d 34, 37 (1st Cir. 1993). Because the issue presented is

a pure question of law, this Court reviews the motion for summary judgment *de novo*, but it is slow to reverse the thoughtfully reviewed, careful conclusions of the Magistrate Judge. *Forcucci* v. *U.S. Fidelity and Guar. Co.*, 11 F.3d 1 (1st Cir. 1993), *citing*, *Rivera-Marcano*, 998 F.2d at 37.

Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Inferences are drawn in favor of defendant, the nonmoving party. *Space Master International, Inc.* v. *City of Worcester*, 940 F.2d 16 (1st Cir. 1991); *Herbert W. Price* v. *General Motors Corporation*, 931 F.2d 162 (1st Cir. 1991) (record viewed in light most favorable to nonmoving party).

In deciding whether a factual dispute is genuine, this Court must determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Aponte-Santiago* v. *Lopez-Rivera*, 957 F.2d 40, 41 (1st Cir. 1992) (*citing Anderson*). A fact is "material" if it might affect the outcome of the suit under the governing substantive law." *Beck* v. *Somerset Technologies*, 882 F.2d 993 (5th Cir. 1989) (*citing Anderson*).

B. *Definition of "Passenger"*

The facts in this case are undisputed. The only question is whether Crocker, who sustained her injuries when struck by a rotating propeller immediately after disembarking from the aircraft, was or was not then still a "passenger". If she was a "passenger" the limit of coverage under the Policy is $100,000. It is clear to this Court that, at least until she disembarked, Crocker was a "passenger *in* [the] aircraft" as defined by the Policy, to wit, "anyone who enters your aircraft to ride in or operate it." The question that remains is whether, for purposes of the Policy, her status as a passenger ceased the moment she stepped out of the plane.

The words of the Policy do not clearly set forth the circumstances under which the status of "passenger" ends. Yet, "[n]ormally, when there is no ambiguity, [courts] will construe the words of an insurance policy according to their ordinary meaning". *Cardin* v. *Royal Ins. Co. of America*, 394 Mass. 450, 476 N.E.2d 200, 203 (1985). In *Emerson* v. *Carolina Casualty Insurance Co.*, 206 F.2d 13 (8th Cir. 1953), the Eighth Circuit Court of Appeals considered a question of insurance coverage under a policy in which passengers were defined only as "persons . . . riding upon or within any vehicle. . . ." The Court noted, however, that:

> [i]t would be difficult if not impossible to state a general rule or definition of passenger which would embrace all elements under all circumstances. . . . While a passenger is ordinarily riding upon or within a vehicle, it is not always necessary that he be doing so in order to be a passenger . . . [i]f what [the injured party] was doing at the time of his injury was reasonable incident to his relationship of the kind of passenger he initially was, he will continue to be a passenger although not physically in or upon the vehicle.

Id. at 16, 18.

There is other precedent, albeit not directly applicable to the case at bar, addressing the meaning of "passenger" for insurance coverage purposes. For example, there are cases, helpful only by analogy, concerning the insurance coverage of common carriers, the liability of international airlines under international treaties and guest statutes. Some of the cases involve insurance policies in which the definition of "passenger", unlike the definition in this case, is expressly extended to persons embarking or disembarking from a vehicle. *See, e.g.*,

Edwards v. *Mutual of Omaha Insurance Co.*, 530 A.2d 1190, 1192 (D.C. Ct. App. 1987), *aff'd*, 842 F.2d 1316 (D.C. Cir. 1988); *Gustafson* v. *National Insurance Underwriters*, 517 S.W.2d 414, 417 (Tex. 1974); *MacSwan* v. *Metropolitan Transit Authority*, 340 Mass. 499, 164 N.E.2d 912, 1914 (1960). *But see, Ludwig* v. *Massachusetts Mutual Life Ins. Co.*, 524 F.2d 376 (7th Cir.), *vacated on other grounds*, 426 U.S. 479, 96 S.Ct. 2158, 48 L.Ed.2d 784 (1976) (additional insurance benefits if insured was injured while "a passenger in or upon public conveyance"); *Emerson* v. *Carolina Casualty Insurance Co.*, 206 F.2d 13 (8th Cir. 1953) ("passenger" defined in the insurance policy as a "person riding upon or within any vehicle").

In the context of common carriers, several courts have adopted a broad interpretation of "passenger" to include a rider who has disembarked but not yet reached a "zone of safety". This standard was first adopted by the Michigan Supreme Court in *Quinn* v. *New York Life Ins. Co.*, 224 Mich. 641, 195 N.W. 427 (1923), with respect to insurance policy coverage for accidents involving a person "travelling as a passenger" on a common carrier.

The United States Court of Appeals for the Seventh Circuit applied this standard to find that the clause "passenger in or upon a public conveyance" covered a person hit by a train while crossing the tracks to reach a different train due to arrive. *Ludwig*, 524 F.2d 376; *see also, Patton* v. *Minneapolis St. Ry. Co.*, 247 Minn. 368, 77 N.W.2d 433 (1956); *Victorson* v. *Milwaukee & Suburban Transport Co.*, 70 Wis.2d 336, 234 N.W.2d (1975); *MacSwan*, 340 Mass. 499, 164 N.E.2d at 1914 (relationship of common carrier to its passenger continues until passenger completes a safe exit).

In *Edwards*, 530 A.2d at 1192, the District of Columbia Court of Appeals interpreted an insurance provision covering any "passenger . . . riding in or getting . . . off" a common

carrier. The Court rejected the "zone of safety" test, but stated that:

> the notion of "getting off" a vehicle includes "all acts normally performed . . . under similar circumstances" by persons departing a similar vehicle and is complete when one "has embarked on an entirely different course of conduct". . . . Some reasonable length of time must be allowed a person, after getting out, for the completion of acts which can reasonably be expected from those in similar situations.

530 F.2d at 1192, 1193, *quoting, Carta* v. *Providence Washington Indemnity Co.*, 143 Conn. 372, 378, 122 A.2d 734, 736, 737 (1956). *See also, Gustafson*, 517 S.W.2d at 417.

In the context of Article 17 of the Warsaw Convention, as amended by the Montreal Agreement, an airline is strictly liable in an amount up to $75,000 for injuries sustained by a passenger on an international flight if the accident "took place on board the aircraft or in the course of any of the operations of embarking or disembarking".[1] Courts interpreting the scope of Warsaw Convention coverage have held that a number of factors must be considered to determine the coverage. These factors include, among others: 1) the activity in which the passenger was engaged at the time of the accident, 2) the physical proximity of the passenger to the aircraft, and 3) the closeness of time of the accident to the passenger's entering or

[1] The "Warsaw Convention" is the Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, TS 876, 49 U.S.C. § 1502 (1982), a multilateral treaty, ratified by the United States. The "Montreal Convention" is the Agreement Civil Aeronautics Board 18900; *see* Liability Limitations of Warsaw Convention and Hague Protocol, 31 Fed.Reg. 7302 (1966). The carriers agreed to adopt a system of absolute liability for covered accidents of $75,000 per passenger. *See*, Liability Limitations for Warsaw Convention and Hague Protocol, 31 Fed.Reg. at 7302.

leaving the airplane. *See, Stovall* v. *Northwest Airlines*, 33 Mass. App. Ct. 1, 4, 595 N.E.2d 330, 332-33 (1992), *citing, Day* v. *Trans World Airlines*, 528 F.2d 31, 33 (2d Cir.), *cert. denied*, 429 U.S. 890 (1976); *Martinez-Hernandez* v. *Air France*, 545 F.2d 279, 282 (1st Cir.), *cert. denied*, 430 U.S. 950 (1977), *citing, Day*, 528 F.2d 31; *MacDonald* v. *Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (defining the scope of liability more narrowly and denying coverage under the Treaty, in part, once the passenger reached a safe point inside the terminal).

While neither of the groups of cases is determinative of the case at bar, which involves the pure interpretation of the language of a contract, they are helpful by analogy. *See, Emerson*, 206 F.2d at 16-17. Furthermore, although this is a question of law about which reasonable minds may differ, this Court finds that at the time of her accident, Crocker had neither reached a "zone of safety", nor "embarked on an entirely different course of conduct", and that therefore she remained a "passenger" within the meaning of the Policy. In fact, Crocker's intention upon leaving the airplane was to obtain assistance in finding a parking place for the aircraft. Clearly, her course of conduct was still related to her status as a passenger in the plane and not to someone whose journey had terminated. Moreover, both the time between Crocker's disembarkment and the accident, as well as her physical proximity to the aircraft, are factors pointing to the conclusion that she was still a passenger.

This Court holds that, even a restrictive interpretation of the definition of "passenger" embraces a person who has just flown as a passenger in an aircraft and is in the process of leaving it. The circumstances in this case are even more clear cut. Rather than leaving the plane after a completed flight, Crocker deplaned to find a parking place for an aircraft still in transit. Accordingly, this Court declines to adopt and accept

the Report and Recommendation of the Magistrate Judge but instead enters summary judgment for plaintiff and a determination that Crocker was a passenger at the time of her accident.

ORDER

For the foregoing reasons, the motion of plaintiff for summary judgment is ALLOWED, and this Court DECLARES that defendant Crocker was a "passenger" at the time of the accident, within the meaning of the Policy.

So ordered:

/s/_____
Nathaniel M. Gorton
United States District Judge

Dated: May 11, 1994.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JUDGMENT IN A CIVIL CASE

U.S. AVIATION UNDERWRITERS, INC.,	)	
v.	)	Case Number: 93-40081-XX(NMG)
FITCHBURG-LEOMINSTER FLYING CLUB, INC., JOHN C. HOLDEN AND DEBORAH G. CROCKER,	)	

☐ **Jury Verdict.**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED.

Judgment for the Plaintiff.

MAY 11, 1994 — *Date*

ROBERT J. SMITH, JR. — *Clerk*

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

U.S. AVIATION UNDERWRITERS, INC., Plaintiff,	)	
v.	)	Civil Action
	)	No. 93-40081-XX-NMG
FITCHBURG-LEOMINSTER FLYING CLUB, INC., JOHN C. HOLDEN AND DEBORAH G. CROCKER, Defendants.	)	

REPORT AND RECOMMENDATION
March 4, 1994

SWARTWOOD, U.S.M.J.

Nature of the Proceeding

This matter was referred to me by Order of Reference dated February 1, 1994 for Findings and Recommendations pursuant to 28 F.R. Civ. P. 57 U.S.C. § 636(b)(1)(B) on Defendant, Deborah G. Crocker's Motion to Dismiss Plaintiff's Complaint, (Docket No. 6) and Plaintiff's Motion for Summary Judgment (Docket No. 10).

Nature of the Case

Plaintiff, United States Aviation Underwriters, Inc. ("U.S.A.U.") filed a Complaint for Declaratory Judgment under 28 U.S.C. § 2201 and F.R. Civ. P. 57 seeking a determination of

certain insurance policy coverage issues arising out of an accident involving the Defendants at the Toronto International Airport on December 25, 1980. The Defendant, Fitchburg-Leominster Flying Club, Inc. ("Flying Club") was the owner of a single-engine Cessna aircraft ("Cessna") which on the date of the accident was being operated by one of its members, the Defendant, John C. Holden ("Holden"). Holden's then wife, the Defendant, Deborah G. Crocker ("Crocker"), was seriously injured after alighting from the Cessna after it landed in Toronto. U.S.A.U. had issued a general non-commercial aviation policy (the "Policy") to the Flying Club which covered the Cessna. The question presented by U.S.A.U.'s Complaint is whether or not at the time of the accident, Crocker was a passenger as defined in the Policy. If she was a passenger, the available insurance coverage is limited to $100,000. If she was not a passenger, such coverage would be increased to $1,000,000.

Facts

1. The Policy covered the period September 1, 1980 through September 1, 1981.

2. The Policy was in effect and covered the Cessna when the accident occurred on December 25, 1980, at the Toronto International Airport.

3. The coverage provided by the Policy had a combined liability coverage for bodily injury and property damage of $1,000,000 "subject to a maximum limit of $100,000.00 per passenger."

4. Under the heading **"Your Liability Coverage"** in the Policy is included the following paragraphs:

> *Coverage for bodily injury to anyone but passengers.* If you have this coverage, [U.S.A.U. will] pay claims for bodily injury and mental anguish to anyone

— except a passenger — who is injured resulting from the ownership, maintenance or use of your aircraft. *A passenger is anyone who enters your aircraft to ride in or operate it.* (emphasis added).

Coverage for bodily injury to passengers only. If you have this coverage [U.S.A.U. will] pay claims for bodily injury and mental anguish to any passenger *in your aircraft* who is injured resulting from the ownership, maintenance or use of the aircraft. *A passenger is anyone who enters your aircraft to ride in or operate it.* (emphasis added).

5. On December 25, 1980, Holden, Crocker and two of Holden's children by another marriage flew in the Cessna on a family trip from the Fitchburg Airport to the Toronto International Airport in Ontario, Canada.

6. Upon landing, Holden taxied the Cessna to the general aviation area of the airport for purposes of locating a parking place.

7. Holden was unsuccessful in finding assistance at this location and taxied the Cessna to a point directly in front of a building where he saw someone through a lighted window.

8. Holden flashed the Cessna's landing lights in an unsuccessful attempt to get the attention of that person.

9. Holden and Crocker then had a brief conversation which resulted in her leaving the Cessna in order to seek assistance from the person Holden saw through the lighted window.

10. Crocker exited the Cessna and walked into the path of its rotating propeller which struck her on the head and left side, causing her severe and permanent physical and mental injuries.

11. On or about December 25, 1990 (ten years following the accident), Crocker commenced a civil action in the Massa-

chusetts Superior Court (Worcester) against Holden and the Flying Club. In her Complaint, she alleged that she was incapacitated by mental illness, due to severe and permanent neurological brain trauma, thus tolling the statute of limitations for commencing a civil action for negligence arising out of this accident.

12. Thereafter, U.S.A.U. filed this action seeking a declaratory determination that Crocker was a passenger at the time she was injured and as such, the available insurance coverage is limited to $100,000.

Discussion

A. Crocker's Motion to Dismiss

Crocker's Motion to Dismiss is filed pursuant to Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted) and 28 U.S.C.A. § 2201 (the Federal Declaratory Judgment Statute). U.S.A.U.'s Complaint seeking declaratory judgment is filed pursuant to 28 U.S.C. § 2201 and F.R. Civ. P. 57 (governing declaratory judgment actions). U.S.A.U.'s Complaint satisfies all of the requirements for seeking such relief in that:

(1) an actual controversy exists between the parties (*i.e.*, whether Crocker was a "passenger" at the time she was injured);
(2) all persons and entities who would be affected by the declaration sought in U.S.A.U.'s Complaint are parties to this action; and
(3) although this court agrees that the Massachusetts Superior Court (Worcester) can adequately determine the issue presented by the U.S.A.U.'s Complaint, (a) no such Complaint is pending in that court and in the interest of justice, expediency, and judicial econ-

> omy, determination of this controversy should be resolved prior to trial of the underlying negligence action, (b) it is unlikely that the issue of whether, for purposes of the Policy, Crocker was a "passenger" at the time she was injured would be adjudicated in the course of the trial of the underlying negligence action, and (c) resolution of the issue of the amount of insurance coverage available under the Policy may facilitate a settlement of the underlying action.

See generally, Eureka Fed. Sav. and Loan Ass'n v. *American Cas. Co. of Reading, Penn.*, 873 F.2d 229 (9th Cir. 1989) (declaratory judgment is appropriate where declaring rights of parties will serve useful purpose in clarifying and settling legal relations and issues and will terminate and afford relief from uncertainty, insecurity and controversy giving rise to proceeding; even though existence of coverage is dependent upon outcome of underlying action, granting of declaratory rights is appropriate because insurer cannot attempt to avoid prolonged and costly litigation by making good faith effort to settle claim without resolution of what is limit of liability coverage); *Metropolitan Property & Liab. Ins. Co.* v. *Kirkwood*, 729 F.2d 61 (1st Cir. 1984) (in determining whether to exercise jurisdiction in declaratory judgment context, court should consider, among other factors, whether considerations of efficiency, fairness and practical convenience for court and parties warrant the court's granting declaratory rights; whether legal issues will be clarified; and whether granting declaratory rights will expedite resolution in underlying dispute).

I find that U.S.A.U.'s Complaint states a claim upon which relief can be granted and for that reason, Crocker's Motion to Dismiss is denied.

B. U.S.A.U.'s Motion for Summary Judgment

U.S.A.U. and Crocker both agree that no ambiguity exists with respect to the wording of the limitation of coverage for passengers in the Policy. If Crocker was a passenger, then U.S.A.U.'s coverage is limited to $100,000. The dispositive issue in this action is whether Crocker was a "passenger" at the time that she was injured.

The court must first look to the Policy itself to determine who is a "passenger" for purposes of determining the amount of coverage available under the Policy. *Frerking* v. *Blue Cross-Blue Shield of Kansas*, 760 F.Supp. 877, 881 (D.Kan. 1991) (court must look to the policy itself to determine what is and is not covered and "[i]n the absence of ambiguity . . . the terms of the insurance policy are to be construed according to their plain, ordinary, and popular sense."); *Cardin* v. *Royal Ins. Co. of Am.*, 394 Mass. 450, 453, 476 N.E.2d 200, 202 (1985) (if there is no ambiguity, court normally will construe words of an insurance policy according to their ordinary meaning).

The Policy provides that U.S.A.U. will "pay claims for bodily injury and mental anguish to any passenger *in* [*the insured's*] *aircraft* who is injured resulting from the . . . use of the aircraft." (emphasis added). Coverage for passengers is limited to $100,000. The Policy defines a "passenger" to be "anyone who enters [the insured's] aircraft to ride in or operate it." Based on this language, U.S.A.U. argues that once Crocker entered the aircraft to ride in it, she became a "passenger" and she would remain a passenger "unless and until . . . she safely exited, disembarked or alighted from the conveyance, and the journey can be said to have 'terminated'." (*Mem. In Sup. of Pl.'s Mot. for Summ. J.* at 8). U.S.A.U. further argues that, since Crocker was (1) struck by the propeller shortly after exiting the aircraft she had not exited "safely," and (2) going towards a building to seek assistance in finding a place to park

the aircraft, her journey had not "terminated" and, therefore, she was still a passenger.

U.S.A.U. cites numerous cases involving the Warsaw Convention (applicable to international air travel), motor vehicle guest statutes and common carrier cases to support its position that the term "passenger" should be interpreted broadly.[1] However, this exercise is unnecessary in light of the clear terms and plain meaning of the Policy. In relying on such other sources, U.S.A.U. ignores the provision which states that the Policy covers claims for injuries to any passenger injured "*in [the insured's] aircraft.*" Under U.S.A.U.'s definition of "passenger," a person who has not entered the aircraft to ride in it is covered for up to $1,000,000, whether injured inside or outside of the aircraft; a person who is walking towards the aircraft to ride in it is injured prior to entering the aircraft is covered for up to $1,000,000; and a person who enters the aircraft to ride in it (*i.e.*, a passenger) and is injured while *in the aircraft* is covered for up to $100,000. But what about the person, such as Crocker, who enters the aircraft to ride in it but is injured after she exits the aircraft? U.S.A.U. argues that such person is a passenger. However, this argument is inconsis-

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[1] *See, e.g., Day* v. *Trans World Airlines*, 528 FR.2d 31, 33-34 (2d Cir. 1975) (whether person was in course of embarking on aircraft depends on what such person was doing, restrictions on movement imposed on such person by airline and location of such person at time of accident); *Emerson* v. *Carolina Cas. Ins. Co.*, 206 F.2d 13, 18 (8th Cir. 1953) (policy covering truck excluded coverage for passengers; court stated that if what person was doing at time of injury was reasonably incident to his relationship as passenger, he continues to be passenger although not physically in vehicle); *Ricotta* v. *Iberia Lineas Aereas de Espana*, 482 F.Supp. 497, 500 (E.D.N.Y. 1979) (court, applying *Day*, found that person who fell off bus bringing her and others from aircraft to terminal was disembarking from aircraft); *MacSwan* v. *Metropolitan Transit Authority*, 340 Mass. 499, 500-01, 164 N.E.2d 912, 913-14 (1960) (in common carrier cases, relationship between common carrier and passenger continues until passenger can safely exit and safe exit is completed); *Bragdon* v. *Dinsmore*, 312 Mass. 628, 630, 45 N.E.2d 833, 834 (1942) (status of person who was guest occupant in automobile depends on whether activity in which such person was engaged at time of accident is incidental to a prearranged transport of such person).

tent with the wording of the Policy which limits coverage only to those passengers injured "*in [the injured's] aircraft*." The logical, consistent extension of U.S.A.U.'s argument must be that there is no coverage for a person, such as Crocker, who enters the aircraft to ride in it and is injured by the aircraft's propeller shortly after exiting the aircraft. Clearly, this is not a fair and reasonable reading of the Policy.[2]

I find it noteworthy that although U.S.A.U. argues that Crocker was still a "passenger" when she exited the aircraft, it does not argue that under the terms of the Policy there is no coverage for Crocker's injuries (because "passengers" are only covered if they are "*in [the insured's] aircraft*"). Instead, U.S.A.U. argues only that the coverage available to Crocker is limited to $100,000. Undoubtedly, U.S.A.U. recogizes, as it must, that a person injured by the insured's aircraft while outside the aircraft is covered under the Policy regardless of whether that person is or is not a passenger. The issue is whether, under the terms of the Policy, the available coverage for such person is limited to $100,000. *See supra* note 2.

It is in U.S.A.U.'s control to define who is and who is not a "passenger" for purposes of its policies. If U.S.A.U. chooses to define "passenger" narrowly and in manner that is, as U.S.A.U. itself suggests, contrary to common sense and established case law, it cannot now ask this court to redefine "passenger" to limit its potential liability under circumstances in which the Policy clearly provides for increased coverage. For this reason, I find that under the terms of the Policy, a person

[2] *See generally, Camp, Dresser & McKee, Inc.* v. *Home Ins. Co.*, 30 Mass. App. Ct. 318, 323-24, 568 N.E.2d 631, 635 (Mass. App. Ct. 1991) (court in reviewing insurance policy must be guided by three fundamental principles: (1) like other contracts, an insurance policy must be "construed according to the fair and reasonable meaning of its words"; (2) exclusionary clauses are "strictly construed against the insurer so as not to defeat any intended coverage or diminish the protection purchased by the insured"; and (3) ambiguities are to be resolved against the insurer.)

who is outside of the aircraft, regardless of whether such person has previously entered the aircraft to ride in it, is not a "passenger" and, therefore, the available coverage under the Policy is not limited to $100,000.[3]

Recommendation

Based on the foregoing discussion, I recommend that U.S.A.U.'s Motion for Summary Judgment be allowed as follows:

1. That for purposes of the Policy, Crocker was not a passenger at the time that she was injured after alighting from the Cessna; and

2. that the available insurance coverage under the Policy is $1,000,000.

Notice to the Parties

The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court WITHIN 10 DAYS of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated

[3] I have considered the case of *Emerson* v. *Carolina Cas. Ins. Co.*, 206 F.2d at 18, in which in order to give effect to two seemingly inconsistent provisions in an insurance policy, the Eighth Circuit found that a person did not have to be "riding upon or within" a vehicle to be a passenger. I find the instant case distinguishable from *Emerson*. Additionally, "[i]f an insurer chooses to use language in a policy which permits two rational interpretations, [the court will] choose the one more favorable to the insured." *Camp, Dresser & McKee*, 30 Mass. App. Ct. at 325, 568 N.E.2d at 635.

that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See United States* v. *Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983; *United States* v. *Vega*, 678 F.2d 376, 378-79 (1st Cir. 1982); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *see also, Thomas* v. *Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

/s/_____

Charles B. Swartwood, III
U.S.M.J.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1622

UNITED STATES AVIATION
UNDERWRITERS, INC.,
Plaintiff-Appellee,

v.

FITCHBURG-LEOMINSTER FLYING
CLUB, INC., ET AL.,
Defendants-Appellees.

DEBORAH G. CROCKER
Appellant.

BEFORE

Torruella, Chief Judge
Coffin, Selya, Cyr, Boudin & Stahl

ORDER OF COURT

Entered: January 13, 1992

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of rehearing *en banc* having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court *en banc*,

It is ordered that a petition for rehearing and a suggestion for a rehearing be denied.

By the Court

/s/_____
Clerk

[cc: Messers Smith, Puciloski, Dunnigan, Sharp, Black, Birch, Eckel and Giunta]